Supreme Court, U.S.
FILED
AUG 26 1998
OFFICE OF THE CLERK

No. 97-2063

In The

Supreme Court of the United States

October Term, 1997

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

vs.

THE HONORABLE JOHN SPERONI, TAMMY SNIDER, and MICHAEL AVERY,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION FOR RESPONDENTS TAMMY SNIDER, MICHAEL AVERY AND PLAINTIFF CLASS

ELIZABETH J. CABRASER
Counsel of Record
MORRIS A. RATNER
SCOTT P. NEALEY
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
Attorneys for Respondents Tammy Snider, Michael Avery and Plaintiff Class
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
(415) 956-1000

148159

(800) 274-3321 • (800) 359-6859

COUNSEL PRESS

QUESTIONS PRESENTED

Defendant State Farm filed its petition after the Illinois Supreme Court declined, without opinion, to grant its request for extraordinary relief to seek interlocutory review of pretrial orders (1) certifying a consumer litigation class; and (2) directing implementation of an initial class notice program. The underlying lawsuit is ongoing. The parties are engaging in pre-trial discovery. The trial on the merits is scheduled to commence on April 13, 1999. The questions before this Court on the limited record now available are:

1. Whether this Court's jurisdiction is properly invoked under 28 U.S.C. § 1257 to review a State court's discretionary denial of leave to file a petition for a writ of mandamus, writ of prohibition and/or supervisory order when the denial is without opinion and further review is not foreclosed;

2. Whether the Due Process Clause of the Fourteenth Amendment requires a State's highest court to afford mandatory interlocutory review of State trial court decisions certifying class actions or ordering class notice;

3. Whether, for purposes of making its initial determination that a multi-state class may be certified, a trial court can constitutionally find that forum state law will likely apply to all claims at the anticipated trial under a state's choice-of-law rules, where the misconduct is alleged to have been conceived in, implemented from, and controlled by the defendant from its headquarters in the forum state;

4. Whether the Due Process Clause entitles a defendant to insist on eliciting the individual testimony of each of the millions of the policyholders that comprise the class, where the evidence submitted by the parties demonstrates, and the trial court determines, that the case presents predominantly common issues of fact that can be determined at trial on a class-wide basis from the defendant's own documents and records, third-party evidence, and expert testimony, and the trial court has made no order depriving defendant of a reasonable defense; and

5. Whether the Due Process Clause of the Fourteenth Amendment prohibits a State court from ordering dissemination of class notice through an intensive multi-media notice publication program, when defendant does not provide an accurate or complete list of class members to whom mailed notice could be sent, and where the notice program is proved to be effective in providing *actual* notice to the class.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Cited Authorities	v
Opinions Below	1
Statement of Jurisdiction	1
Statement of the Case	1
A. The Trial Court's Certification Order Was Based On A Substantial Factual Record Submitted By Both Parties At A Four-Day Evidentiary Hearing.	1
B. The Trial Court's Notice Order Was Based Upon The Evidence Presented By The Parties.	4
C. Petitioner State Farm Has Pursued Multiple Appeals And Otherwise Acted To Delay The Pretrial Proceedings.	4
Summary of Argument	6
Reasons for Denying the Writ	7
I. This Court Cannot And Should Not Entertain Petitioner's Request For Interlocutory Review.	7

Contents

Page

A. There Is No "Final Judgment" To Be Reviewed. 7

B. There Is No Federal Question. 12

C. This Court Should Decline To Reach Any Purported Federal Issues Before They Are Ripe. 13

II. A Requirement Of Mandatory Interlocutory Review Of Class Certification Orders Is Foreclosed By Principles Of Federalism. 14

III. The Trial Court Did Not Make A Choice Of Law Decision And The Class Is Certifiable Under Illinois Or Multiple States' Laws. 18

IV. The Trial Court's Decision To Certify The Class Raises No Federal Question. 21

V. In Approving The Class Notice Program The Trial Court Correctly Applied Illinois Precedent And The Due Process Rulings Of This Court To Its Factual Findings. 24

Conclusion 30

TABLE OF CITED AUTHORITIES

Cases Cited: *Page*

Adams v. Robertson, 520 U.S. 83 (1997) 13

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) 20

AmChem Prods. Inc. v. Windsor, 117 S. Ct. 2231 (1997) 2, 23, 25

Anderson v. City of Bessemer, 470 U.S. 564 (1985) .. 27

Ashwander v. TVA, 297 U.S. 288 (1936) 14

Bazemore v. Friday, 478 U.S. 385 (1988) 23

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 18, 19

Board of Educ. of Los Angeles v. Superior Court, 448 U.S. 1343 (1980) 12

Branch v. European Autohaus, Ltd, 424 N.E. 2d 6 (Ill. 1981) 8

Branti v. Finkel, 445 U.S. 507 (1981) 27

Carey v. Scotillo, 417 N.E. 2d 1356 (Ill. 1981) 11

Cartt v. Superior Court, 124 Cal. Rptr. 376 (Cal. App. 1975) 29

City of New York v. New York, New Haven & Hartford RR Co., 344 U.S. 293 (1953) 28, 29

Table of Cited Authorities

Page

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 6, 10, 11, 17

Cope v. Metropolitan Life Insurance Co., 696 N.E. 2d 1001 (Ohio 1998) 22, 23

Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) 10, 12

Department of Banking of Nebraska v. Pink, 317 U.S. 264 (1942) 8, 9, 10, 11

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) .. 28

Ex Parte Masonite, 681 So. 2d 1068 (Ala. 1996) 14, 15

Flanagan v. United States, 465 U.S. 259 (1984) 7

Flores v. Dugan, 435 N.E. 2d 480 (Ill. 1982) 9

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 13

Frank v. Teachers Ins. Annuity Assoc. of America, 71 Ill. 2d 583 (1978) 28

GE v. Joiner, 118 S. Ct. 512 (1997) 24

Gillette Co. v. Miner, 459 U.S. 86 (1982) 11

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) .. 27

Gordon v. Boden, 586 N.E. 2d 461 (Ill. App. 1991) .. 4

Table of Cited Authorities

	Page
Gospel Army v. Los Angeles, 331 U.S. 543 (1947) ...	8
Hanlon v. Chrysler Corp., 1998 U.S. App. LEXIS 11957 (9th Cir. 1998)	25
Hansberry v. Lee, 311 U.S. 32 (1940)	25
Herb v. Pitcairn, 324 U.S. 117 (1945)	13
Hernandez v. New York, 500 U.S. 352 (1991)	27
Illinois v. Gates, 462 U.S. 213, (1983)	18
In re Domestic Air Antitrust Litigation, 141 F.R.D. 534 (N.D. Ga. 1992)	29
In re: Prudential Ins. Co. Am. Sales Practices Lit. Agent Actions, 1998 U.S. App. LEXIS 17057 *92-93 (3d Cir. 1998)	23
Johnson v. Frankell, 117 S. Ct. 1800, (1997)	14, 17
Lindsey v. Normet, 405 U.S. 56 (1972)	24
Lockwood Motors, Inc. v. General Motors Corp., 162 F.R.D. 569 (D. Mn. 1995)	23
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) ..	25
Lynch v. New York Ex Rel Pierson, 293 U.S. 52 (1934)	13

Table of Cited Authorities

	Page
Lynumn v. Illinois, 372 U.S. 528 (1963)	13
Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997)	23
Market St. Railway Co. v. RR. Comm'n of California, 324 U.S. 548 (1945)	8, 9
Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367 (1970)	21
Miner v. Gillette Co., 428 N.E. 2d 478 (Ill. 1981), *cert. dismissed*, 459 U.S. 86 (1982)	4, 11
M.L.B. v. S.L.J., 117 S. Ct. 555 (1996)	17
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	27, 28, 29, 30
National Marine, Inc. v. The Illinois Env'n Protection Agency, 639 N.E. 2d 571 (Ill. 1994)	14
North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973)	7, 8
O'Hara v. State Farm Mut. Auto. Ins. Co., 484 N.E. 2d 834 (Ill. App. 1985)	9
Owen v. Mann, 475 N.E. 2d 886 (Ill. 1985)	5

Table of Cited Authorities

	Page
Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987)	15
The People ex rel. Hartigan v. The Illinois Commerce Comm'n, 117 Ill. 2d 120, 510 N.E. 2d 865 (1987)	18
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)	2, 6, 15, 18, 19, 20, 21, 25, 28, 29
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945)	7, 8
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)	7
Relph v. The Bd. of Educ. of DePue Sch. Dist., 420 N.E. 2d 147 (Ill. 1981)	9
Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948)	7, 8
Simcox v. Simcox, 546 N.E. 2d 609 (Ill. 1989)	14
South Chicago Community Hosp. v. The Industrial Comm'n, 254 N.E. 2d 448 (Ill. 1969)	9
Sperry Rand Corp. v. Larson, 554 F.2d 868 (8th Cir. 1977)	21
Statland v. Freeman, 493 N.E. 2d 1075 (Ill. 1986) ...	5

Table of Cited Authorities

	Page
Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998)	13
Stembridge v. Georgia, 343 U.S. 541 (1952)	18
Street v. New York, 394 U.S. 576 (1969)	13
Sun Oil v. Wortman, 486 U.S. 717 (1988)	15
Taylor v. Freeland & Kronz, 503 U.S. 638 (1992)	10
Texaco-Cities Service Pipeline Co. v. McCaw, 695 N.E. 2d 481 (Ill. 1998)	18
Texas v. United States, 118 S. Ct. 1257 (1998)	13
United States v. Armour & Co., 402 U.S. 673 (1971)	24
United States v. Johnston, 268 U.S. 220 (1925)	21
United States v. Scheffer, 118 S. Ct. 1261 (1998)	24
Walker v. City of Hutchinson, 352 U.S. 112 (1956)	28, 29
Warth v. Seldin, 422 U.S. 490 (1975)	13
Wolf v. Weinstein, 372 U.S. 633 (1963)	21
Wright v. Stone Container Corp., 524 F.2d 1058 (8th Cir. 1975)	21

Table of Cited Authorities

Page

Statutes Cited:

15 U.S.C. § 1011 18

28 U.S.C. § 1257 ..... i, 1, 6, 7, 10, 11, 12

28 U.S.C. § 1291 10

28 U.S.C. § 1292(b) 17

806 Fla. Admin. Cod. Ann. 4-166-027(10) 20

United States Constitution Cited:

Art. III § 2 7

Fourteenth Amendment ..... i, ii

Rules Cited:

Fed. R. Civ. P. 23 ..... 2, 16, 28

Fed. R. Civ. P. 23(f) 5, 16

Fed. R. Ev. 401 24

Fed. R. Ev. 402 24

Fed. R. Ev. 403 24

Ill. Sup. Ct. Rule 301 9

Table of Cited Authorities

Page

Ill. Sup. Ct. Rule 308 .....5, 9, 11, 16

Ill. Sup. Ct. Rule 308(a) 4, 16, 17

Ill. Sup. Ct. Rule 381 11

Ill. Sup. Ct. Rule 383 11

Sup. Ct. Rule 14.1(a) 10

Other Authorities Cited:

HRS § 431:1OC-313.6(a) 20

211 CMR 1303-04(1) 19

Address of Chief Justice Vinson before the American Bar Association, September 7, 1949, 69 S. Ct. v, vi ... 21

Cabraser, "Life after *AmChem*: The Class Struggle Continues," 31 L.A. L. Rev. 373 (1998) 15

Forde, *Class Actions* (Ill. Inst. for CLE 1996) 15

Manual for Complex Litigation, Third (Federal Judicial Center 1995), § 30.232 to designate subclasses, 735 ILCS 5/2-803 9

735 ILCS 5/2-101 15

735 ILCS 5/2-103(e) 15

735 ILCS 5/2-801 2

Table of Cited Authorities

	Page
735 ILCS 5/2-802	9, 21
735 ILCS 5/2-802(b)	9
Robert L. Stern, et. al., *Supreme Court Practice* 108 (7th ed. 1993)	12

APPENDIX

Appendix A — Order Of The Supreme Court Of Illinois Dated January 21, 1998	1a
Appendix B — Transcript Of Proceedings Dated February 26, 1998	2a
Appendix C — Record Sheet	15a
Appendix D — Court-Ordered Class Action Notice	16a

OPINIONS BELOW

Respondents note two additional opinions below: (1) A January 21, 1998 Illinois Supreme Court unreported order, without opinion, taking no action on State Farm's first petition for extraordinary writ (Res. App. A); (2) The Trial Court's February 26, 1998 unreported order denying State Farm's request for leave to file interlocutory appeals of the class certification and notice rulings (Res. App. B).

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to entertain this Petition under 28 U.S.C. § 1257. *See infra* at 7-14.

STATEMENT OF THE CASE

The underlying lawsuit, *Snider v. State Farm Mut. Auto. Ins. Co.*, is a straightforward consumer deceptive practices and breach of uniform contract case, involving one company's common course of conduct, and a comparison of what plaintiffs claim is a deceptive and illegal disparity between its standard contract provisions and its actual auto repair practice. The suit was brought in Illinois, where State Farm is headquartered, and from where the conduct at issue emanates. The suit was filed in Illinois State court because there is no federal statute involved and the minimum amount in controversy for diversity jurisdiction is not met. Lead plaintiff/class representative Tammy Snider was a resident of Marion, Williamson County, Illinois, where the suit was filed. The Trial Court certified a plaintiff class, and ordered the dissemination of notice. The parties are preparing for trial. State Farm has attempted to delay these proceedings by, *inter alia*, pursuing multiple specious interlocutory appeals.

A. The Trial Court's Certification Order Was Based On A Substantial Factual Record Submitted By Both Parties at a Four-Day Evidentiary Hearing.

1. The class certification hearing conducted by the Trial Court included a four day evidentiary hearing that included exhaustive testimony from both parties, and the admission of 189 exhibits from Plaintiffs, plus substantial evidence from State Farm, regarding the way State Farm determines what it will pay to repair its

insureds' cars when accident claims are made. (*Id.* at 6, 8-9.) The evidence proved that State Farm's insurance policies include materially identical contractual provisions that require State Farm to pay to restore insureds' cars to their pre-loss condition using parts of "like kind and quality." In an alleged violation of this contractual language, State Farm allows coverage only for the cheapest parts, even when such parts are imitation "non-original equipment manufacturer" ("non-OEM") parts.

Plaintiffs demonstrated at the class certification hearings that the trial in this case will involve common issues: First, the Trial Court must decide if the 25 imitation, non-OEM "crash parts" that are the subject of the *Snider* action (the order attached as Pet. App. C defines the class of insureds and specifies the 25 crash parts involved in this case) are categorically and inherently inferior. Second, the Trial Court must resolve the legal question of whether Petitioner, by requiring the uniform use of these parts, and through a course of conduct designed to conceal the true import of this practice from its policyholders, breached its contractual obligations and committed consumer fraud.[1]

2. On December 5, 1997, the Trial Court issued its 17-page opinion summarizing the evidence and finding that plaintiffs satisfied the numerosity, commonality, typicality, adequacy of representation, predominance and practicability requirements of 735 ILCS 5/2-801, *et seq.*, Illinois' counterpart to Fed. R. Civ. P. 23, warranting certification of the plaintiff class, whose members reside in 48 states. Trial Court's opinion, the culmination of five months of intensive Class-related briefing and hearings, reflects careful consideration of applicable Illinois state precedent and federal jurisprudence, including *AmChem Prods. Inc. v. Windsor*, 117 S. Ct. 2231 (1997) and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and the evidence, arguments and proposed orders and findings presented by both sides.

---

1. Nothing in this lawsuit will prevent State Farm or anyone else from using non-OEM parts, provided it does so under appropriate policy language and that it fully discloses its claims practice. Plaintiffs seek from the Trial Court a judgment that corrects State Farm's deceptive practice, enables consumers to make fully informed decisions about their insurance coverage, and gives State Farm's policyholders what they paid for, nothing more and nothing less.

Petitioner incorrectly asserts that the Trial Court made a choice-of-law ruling in its certification order; it did not. Instead, the Trial Court held that, under the particular factual circumstances of this case, it was likely that the Court *could* apply Illinois law to all claims. The *Snider* court held:

> ***While it is not necessary for the Court at this time to decide upon choice of law*** as to the breach of contract claim, it does note that **the eventual decision as to choice of law will not prevent the certification of the Class in this case**. . . . ***The Court retains the right to divide the litigation into a manageable number of sub-classes under 2-802(b) should differences in law present themselves***.

(Pet. App. at 11a (emphasis added)). Illinois law, and United States Supreme Court precedent, provide that the Trial Court may apply forum law classwide or, in the alternative, apply multiple states' laws and create any necessary subclasses. The Trial Court's class certification order recognizes these alternatives. (*Id.* at 10a-11a.)[2]

At the Trial Court concluded: "Plaintiffs will now have the opportunity to try and prove the merits of their claims, which is an entirely different matter from establishing the requirements for class certification." (Pet. App. at 16a.)

B. The Trial Court's Notice Order Was Based Upon The Evidence Presented By The Parties.

Both parties extensively briefed the notice issue with each party submitting a class notice proposal supported by evidence and affidavits. The Trial Court then held a full-day evidentiary hearing on December 29, 1997. (Lodging App. at 12.) Afterwards,

---

2. When the Trial Court makes a choice of law determination, class members and other interested persons (including State Attorneys General and Commissioners of Insurance, all of whom are aware of the *Snider* action) may seek to demonstrate that a particular state's law affords more protection and better remedies to class members resident in that state. In that instance, the Court may (and has indicated that it will) create subclasses for the benefit of such residents. (*Id.* at 11a.)

both parties submitted additional briefing. On February 25, 1998, the Trial Court issued a 13-page order directing implementation of a notice plan similar to the plan submitted by Respondents. As refined by the trial court, the *Snider* notice plan (described in more detail, *infra* at 26-27) called for publication of notice in six major national publications and over 850 local newspapers, covering every state. The notice was disseminated over the Internet and by "earned media" efforts which generated news and feature stories on the *Snider* action. The notice plan, which has now been completed, cost over $585,000, and reached over 78% of the potential class members (7/9/98 Notice Imp. Aff. at 2), a substantially higher percentage than Petitioner's mailed notice would have reached.

In response to Petitioner's contentions that due process required mailed notice in this case, the Trial Court found that petitioner was unable to provide a reasonably accurate or complete list or class members, and that mailed notice was therefor ineffective and impracticable. (*Id.* at 26a.) The Court held:

> [n]othing in *Mullane* requires individual mailed notice be afforded to an inaccurate and incomplete list of class members, especially given the equally or more effective published notice campaign which can be implemented in this case.

(*Id.* at 29a.)

C. Petitioner State Farm Has Pursued Multiple Appeals And Otherwise Acted To Delay The Pretrial Proceedings.

1. Although Illinois practice (like federal practice) allows for interlocutory appeal when the trial court finds that "immediate appeal from the order may materially advance the ultimate determination of the litigation," Ill. Sup. Ct. Rule 308(a), and although this procedure is available to review class certification orders, *Miner v. Gillette Co.*, 428 N.E. 2d 478, 480 (Ill. 1981), *cert. dismissed*, 459 U.S. 86 (1982); *Gordon v. Boden*, 586 N.E. 2d 461 (Ill. App. 1991), *Petitioner chose to voluntarily bypass this normal procedure for seeking appellate review.* Instead, on the close of business on December 23, 1997, Petitioner filed a

petition for extraordinary writ with the Illinois Supreme Court. Petitioner chose to appeal directly to the Illinois Supreme Court despite the fact that mandamus is an "extraordinary remedy," *Statland v. Freeman*, 493 N.E. 2d 1075, 1077 (Ill. 1986), which "will not lie to correct an abuse of discretion." *Owen v. Mann*, 475 N.E. 2d 886, 890 (Ill. 1985).[3]

On January 21, 1998, the Illinois Supreme Court declined to grant Petitioner's request for discretionary extraordinary relief. (Res. App. A.)

2. Next, State Farm filed for and received an *ex parte* temporary restraining order on January 28, 1998, from the Hon. Albert Green to stop the ongoing *Snider v. State Farm* litigation.[4] 1/28/98 Hearing at 18-22. After Respondents made a special appearance, Judge Green determined that he had been misinformed, and presented incomplete and misleading information by State Farm, and had erred in issuing the temporary restraining order. 2/4/98 Hearing at 34-36.

3. On February 25, 1998, after briefing and hearing, the Trial Court entered its order approving the class notice plan. (Pet. App. D.) Petitioner then requested leave under Ill. Sup. Ct. Rule 308 to seek interlocutory review of the court's certification and notice orders. Declining Petitioner's request, the Trial Court noted:

> In the almost three months since this class was certified, there has not been any request for a

3. Because Illinois practice currently affords the opportunities for discretionary review of class certification orders that Federal practice may prospectively provide under the new Rule 23(f), anticipated to become effective December 1, 1998, this case does not present the Question of a lack of adequate review that Petitioner and *amicus* assert. Rather, Petitioner failed at what we assume to be a strategic choice to attempt to end run the normal course of interlocutory appeal in its home State's courts.

4. An earlier case involving non-OEM parts, *Krusinski v. State Farm*, No. 87C710253 had been filed in Cook County Illinois Court and assigned to the Hon. Albert Green. Judge Green certified an Illinois-only class after State Farm had agreed to settle claims arising from its use of non-OEM parts which had occurred prior to April 16, 1994. This case was entirely concluded, and the *Snider* class definition excluded these claims.

> Rule 308 appeal by State Farm or really any inkling given to the Court that any such request would be made. We are now 11 months away from the scheduled trial date in this case, and . . . significant resources have already been expended. . . . [A]ll the issues . . . that State Farm requests for interlocutory appeal can, of course, be decided by direct appeal [after] trial. (Res. App. at 13a.)

The next day, Petitioner again filed a request for extraordinary writ with the Illinois Supreme Court, raising the three issues it raises before this Court. After extensive briefing on March 24, 1998, that Court issued an order denying, without opinion, the motion for extraordinary writ. (Pet. App. A.)

SUMMARY OF ARGUMENT

State Farm's Petition should be denied on the following grounds:

• *Jurisdiction.* This Court lacks jurisdiction under 28 U.S.C. § 1257 because there is no final judgment, and no federal issue.

• *Ripeness.* Even if jurisdiction did exist, this Court should decline review because issues raised by Petitioner are not ripe for review; the underlying orders are inherently tentative and subject to alteration by the state trial court.

• *No Mandatory Review of Certification Orders.* Petitioner's request for mandatory interlocutory review of a trial court decision certifying a class is improper, under this Court's decision in *Coopers*, and under the principles of federalism which protect the ability of State courts to control their own appellate procedures.

• *Choice of Law.* The Trial Court's finding that any eventual decision as to choice of law would not bar certification raises no federal question. The eventual hearing before the Trial Court will show there are no true conflicts under *Philips Petroleum Co. v. Shutts*; assuming, *arguendo,* any conflicts existed, Illinois has sufficiently substantial governmental interests to apply its law to all claims. Petitioner and Amicus will have a full opportunity to

present their choice-of-law arguments to the Trial Court before any final determination is made.

• *Class Certification.* The Trial Court's class certification decision was consistent with the substantial evidentiary record created by the parties, raises no federal question, and is consistent with applicable law.

• *Notice.* No rule of law or reason requires a trial court to order notice by mail, where such notice is demonstrated to be impracticable and effective, and where notice by publication is proved to be effective in providing *actual* notice.

REASONS FOR DENYING THE WRIT

I. THIS COURT CANNOT AND SHOULD NOT ENTERTAIN PETITIONER'S REQUEST FOR INTERLOCUTORY REVIEW.

A. There Is No "Final Judgment" To Be Reviewed.

This Court's power to review State court decisions is limited by Art. U.S. Const. Art. III § 2, which gives this Court "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Ever since 1789, Congress has granted this Court power to review only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257.[5]

---

5. The final judgment rule is an important component of our federal system. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67 (1948). First, the final judgment rule "avoids the mischief of economic waste and of delayed justice," *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945), by allowing cases to proceed to and through trial without being subjected to expensive and time-consuming piecemeal review by this Court. *See Flanagan v. United States*, 465 U.S. 259, 264 (1984) (same). Second, by requiring a full trial and appellate record the rule "avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III." *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973); *see also Regional Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1974) (same). Third, the final judgment rule allows consideration of state law issues first, thereby avoiding premature or unnecessary constitutional adjudication. *Republic Natural*

(Cont'd)

The judgment upon which review is sought is not final. Any reviewable judgment must be final in two senses:

> It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.

Market St. Railway Co. v. RR. Comm'n of California, 324 U.S. 548, 551 (1945).

> [T]he test is not whether under the local rules of practice the judgment is denominated final . . . but rather whether the record shows that the *order of the appellate court has in fact fully adjudicated rights* and that that adjudication *is not subject to further review by a state court.*

Department of Banking of Nebraska v. Pink, 317 U.S. 264, 268 (1942) (*per curiam*) (emphasis added).

The effect of a judgment under local practice plays a key role in determining if a judgment is final. As in *Gospel Army v. Los Angeles*, 331 U.S. 543, 548 (1947), where jurisdiction was found lacking because "the effect of the judgment under state practice is to remand the case for a new trial," the practical effect of the judgment below under Illinois law will begin our analysis of the lack of a "final judgment" below.

Under Illinois law, finality "is determined by the substance as opposed to the form of the order." *Branch v. European Autohaus, Ltd*, 424 N.E. 2d 6, 8 (Ill. 1981). A final judgment is "a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the

---

(Cont'd)
Gas Co., 334 U.S. at 71. Finally, as Justice Frankfurter noted in *Radio Station WOW, Inc.*, "this prerequisite to review derives added force when the jurisdiction of this court is evoked to upset the decision of a State court," *Id.*, 326 U.S. at 124, as it "leave[s] at a minimum federal intrusion in state affairs." *North Dakota State Bd. of Pharmacy*, 414 U.S. at 159.

parties in the lawsuit." *Flores v. Dugan,* 435 N.E. 2d 480, 482 (Ill. 1982). "Where an order of the court leaves a cause still pending and undecided, it is not a final order." *O'Hara v. State Farm Mut. Auto. Ins. Co.,* 484 N.E. 2d 834, 836 (Ill. App. 1985).

Denial of review is not a final judgment. As the court in *South Chicago Community Hosp. v. The Industrial Comm'n,* 254 N.E. 2d 448, 449 (Ill. 1969), found:

> [t]he order which dismissed writs of certiorari . . . is plainly interlocutory. It did not decide the right to compensation, nor did it determine a separate issue of the litigation which will result in its final disposition.

See also Relph v. The Bd. of Educ. of DePue Sch. Dist., 420 N.E. 2d 147, 150 (Ill. 1981) (denial of leave "has no precedential effect and in no way amounts to a consideration of the merits.").

Under Illinois practice the decision below is therefore not a final judgment. The order neither ascertained nor fixed absolutely and finally either Respondents' or Petitioner's rights. The order upon which *certiorari* is sought left the underlying dispute still pending, with discretionary interlocutory relief under Ill. Sup. Ct. Rule 308, direct appeal as of right under Ill. Sup. Ct. Rule 301 or further petition via writ to the Illinois Supreme Court still available.[6] Because "further review or correction" *Market St. Railway Co.,* 324 U.S. at 551, is available under Illinois state procedure as a matter of discretion and right, and the decision of the Illinois Supreme Court has not "in fact fully adjudicated rights," *Pink,*

---

6. The underlying orders of the Trial Court are not final orders. Under Illinois law the certification order is not final and can — as the Trial Court did with its February 11, 1998 order, modifying the class definition to add a "crash parts" definition — be modified at any time. *See* 735 ILCS § 5/2-802. Likewise the court is free to order additional notice, *see* 735 ILCS § 5/2-802(b); Manual for Complex Litigation, Third (Federal Judicial Center 1995), § 30.232 to designate subclasses, 735 ILCS 5/2-803, or to make a choice of law determination at an appropriate time.

317 U.S. at 268. Review by this Court is therefore foreclosed as a matter of federal law under 28 U.S.C. § 1257.[7]

State Farm implies that "finality," for purposes of 28 U.S.C. § 1257 jurisdiction, is the rejection by a State's highest court of any particular petition for review, even if review may be obtained at a later date by the filing of a subsequent appeal. This semantic argument is unable to nullify the express limits placed on this Court by 28 U.S.C. § 1257.[8]

---

7. The Trial Court's orders would not be final under 28 U.S.C. § 1291 either. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

> First, such an order is subject to revision in the District Court. . . . Second, the class determination generally involves considerations that are "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." . . . Finally, an order denying class certification is subject to effective review after final judgment,

Id. (internal citations omitted). *Coopers* applies with equal force to the review of State court judgments under 28 U.S.C. § 1257. C.f., *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 502 (Rehnquist, J. dissenting). Foreclosing review in this case this Court noted: "we hold that orders relating to class certification are not independently appealable under § 1291 prior to judgment." *Coopers & Lybrand*, 437 U.S. at 470.

8. By neither raising nor relying upon the exceptions to finality under 28 U.S.C. § 1257 contained in *Cox Broad. Corp.*, *supra*, State Farm waived these arguments under Sup. Ct. Rule 14.1(a). *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645 (1992) (issues may not be raised for first time in opening brief). Respondents feel constrained, however, to note that this is not a circumstance where these special rules might apply.

First, this is not the case where "the federal issue is conclusive or the outcome of further proceedings preordained," *Cox Broad. Corp.*, 420 U.S. at 477, 479. Although Respondents would be pleased to have Petitioner concede liability, both trial on the merits and Petitioner's right to an appeal persist. Both present opportunities to decide the case without decision on the federal issues. *Second*, this is not a circumstance where "the federal issue, finally decided by the highest court in the State, will survive to require decision regardless of the outcome of further state-court proceedings." *Id.* at 480. Any number of rulings prior to or at trial, or the eventual judgment itself in this case, could be against Respondents, thereby removing the need to decide the Federal issues. *Third*, this is not a situation

(Cont'd)

The flaw in Petitioner's apparent argument is shown by *Gillette Co. v. Miner,* 459 U.S. 86 (1982). In *Miner,* the Illinois Supreme Court had provided *interlocutory review* of class certification issues under Ill. Sup. Ct. Rule 308, *see Miner*, 428 N.E. 2d at 480, and remanded the case to the trial court. *Id.* at 20. In a *per curiam* opinion this Court held, "[t]here being no final judgment, the writ of certiorari is dismissed for want of jurisdiction." *Gillette Co.*, 459 U.S. at 86.

Both Interlocutory appeals under Ill. Sup. Ct. Rule 308 and petitions for extraordinary writ under Rule 381 and 383 are at the court's discretion, and the result on remand — further proceedings — are identical. *Carey v. Scotillo,* 417 N.E. 2d 1356, 1359 (Ill. 1981). Allowing jurisdiction to be founded merely on the name of the relief sought; mandamus *vs.* interlocutory appeal; as Petitioner appears to argue, would disregard this Court's admonition that:

> The test is not whether under the local rules of practice the judgement is denominated final . . . but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review by a state court.

Pink, 317 at 268. Where the results of the order below are identical to that in *Gillette Co.*; further proceedings in the trial court, this Court's conclusion must be identical — there is no jurisdiction under 28 U.S.C. § 1257.

(Cont'd)
where "the federal claim has been finally decided . . . [and] later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 801. Nothing in Illinois law prevents Petitioner from raising these issues again. *Fourth*, this is not a circumstance where "the federal issue has been finally decided in the state courts . . . [and] a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.* at 482-483. The argument that special rules of finality are necessary in class actions to prevent parties from settling was unanimously rejected in *Coopers & Lybrand*, 437 U.S. at 467-470. This ruling requires rejection of any argument by Petitioner that if it cannot secure review, it may have to compromise the underlying action. *See also infra*, n.14 (empirically challenging Petitioner's contention).

The cases cited by Petitioner entirely fail to support its simplistic argument that because other mandamus petitions have been "final," the Illinois Supreme Court's denial of mandamus is "final" under 28 U.S.C. § 1257. Each case cited by Petitioner is distinguishable because the underlying State court's action (styled as mandamus or prohibition): (1) addressed and decided the federal issues on the merits with no further review available; and (2) conclusively determined the constitutional limits of a lower court's jurisdiction. Here, the only issues raised by State Farm concern a trial court's findings on the record; none concern issues of power to adjudicate, which are traditionally raised in separate proceedings. Also, here there is no indication the Illinois Supreme Court based its decisions on the federal question Petitioner asserts, nor did its decision foreclose further review.[9] Petitioners have not cited a single case arising in circumstances similar to those of this Petition were this Court has found jurisdiction, and the undersigned counsel have been unable to locate one.

B. There Is No Federal Question.

The denial of leave below *without opinion* also raises serious jurisdictional questions which foreclose review at this time. The Illinois Supreme Court may have declined leave as a matter of discretion, on state substantive or procedural grounds, or due to the lack of a federal issue. It is impossible to know, or to divine, the reasoning of the Illinois Supreme Court or to determine if they decided, or erred in deciding, a federal issue.

---

9. The final opinion cited by Petitioner, *Board of Educ. of Los Angeles v. Superior Court*, 448 U.S. 1343 (1980), is merely a statement of probable jurisdiction by then-Justice Rehnquist sitting as Circuit Justice. It is also not clear that the jurisdictional issues were clearly raised or briefed by the parties. Then-Justice Rehnquist's statement in *Board of Educ. of Los Angeles* should be viewed as an example of the exceptions in *Cox Broad. Corp., supra*, n.8, not at issue here. Petitioners in that case requested a stay of an action they contended would destroy their federally protected rights, thereby implicating the fourth *Cox Broad.* exception. *See id.* No such claim is or can be made by Petitioner here.

Defendant also cites to Robert L. Stern, et. al., *Supreme Court Practice* 108 (7th ed. 1993). However, nowhere in that work do the authors suggest that jurisdiction exists in the circumstances of this case.

It is well-recognized that this Court lacks jurisdiction to review decisions based upon independent and adequate state grounds. *Fox Film Corp. v. Muller,* 296 U.S. 207 (1935). This being so, this Court has held that it lacks jurisdiction absent a showing by Petitioner that the court below decided the federal issue, and rested its decision on federal grounds, rather than state law. As Chief Justice Hughes noted:

> jurisdiction cannot be founded on surmise . . . It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record. . . . that its decision of the federal question was necessary to the determination of a cause, and that it was actually decided.

Lynch v. New York Ex Rel Pierson, 293 U.S. 52, 54 (1934).

Because there is no opinion below, this Court should presume that the Illinois Supreme Court's refusal to entertain State Farm's request for extraordinary writ was an exercise of that court's discretion or a decision on matters of local practice. *See Adams v. Robertson,* 520 U.S. 83 (1997); *Street v. New York,* 394 U.S. 576, 582 (1969) (Harlan, J.). The presumption that the decision below was not made on a federal issue should be at its strongest when, as here, *see, e.g., infra,* n.10, 14, adequate and independent grounds — which were highlighted in Respondents' briefs to the Illinois Supreme Court — appear on the record, and there is no indication that the State court based its decision on federal law. *Herb v. Pitcairn,* 324 U.S. 117, 128 (1945); cf. *Lynumn v. Illinois,* 372 U.S. 528, 535 (1963).

C. This Court Should Decline To Reach Any Purported Federal Issues Before They Are Ripe.

Whether the issue is considered one of standing, *see, e.g., Warth v. Seldin,* 422 U.S. 490, 516 (1975); *Steel Co. v. Citizens for a Better Env't,* 118 S. Ct. 1003, 1016 (1998); avoidance of advisory opinions, *see, e.g., Herb,* 324 U.S. at 126; refusal to consider issues not ripe for decision, *see, e.g., Texas v. United States,* 118 S. Ct. 1257, 1259 (1998); or the respect for sister courts

required by our system of federalism. *See, e.g., Johnson v. Frankell*, 117 S. Ct. 1800, 1807 (1997), it is well established that this Court will not reach and decide issues prior to the necessity of their being decided. *See Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J. concurring). Each of these doctrines, compels the conclusion that this Court must decline to decide an issue that the state courts of Illinois have neither addressed (the choice of law issue) or which can be modified or overturned prior to the issue reaching this Court (the class certification and notice decisions).[10] Accordingly, none of the issues raised in State Farm's Petition is ripe for review, and the Petition should therefore be denied.

II. A REQUIREMENT OF MANDATORY INTERLOCUTORY REVIEW OF CLASS CERTIFICATION ORDERS IS FORECLOSED BY PRINCIPLES OF FEDERALISM.

Petitioner contends, without empirical or factual support, that defendants are *compelled* to settle large class actions once they are certified, and that therefore, "it is critical that the Court act now to review the class certification order rather than wait until after the trial on the merits." (Petition at 28.)[11] In other words, Petitioner

10. The Illinois Supreme Court also refuses to issue advisory opinions or entertain cases before they are ripe, *National Marine, Inc. v. The Illinois Env'n Protection Agency*, 639 N.E. 2d 571, 575 (Ill. 1994); *Simcox v. Simcox*, 546 N.E. 2d 609, 612 (Ill. 1989), which constitutes independent and adequate state grounds.

11. This contention is refuted by the *Snider* record (*see* Lodging App.); Plaintiffs are preparing for trial, not pressing for settlement. To support its claim that certification decisions are coercive, defendant cites to a single case, *Naef v. Masonite*, contending it is an example of a trend of coercive settlements that require a new rule of immediate interlocutory relief. These arguments are wrong. First, the undersigned counsel was one of Plaintiffs' counsel in the *Masonite* case. Rather than settling as a result of the class certification order itself, the defendant actually settled after defendant had availed itself of the opportunity for interlocutory review *via* petition for writ of mandate to the Alabama trial court, which was denied, *Ex Parte Masonite*, 681 So. 2d 1068 (Ala. 1996), *followed by a jury trial* that decided, after a four-week trial, that defendant's product had been defective. Second, the regional chauvinism and disdain for State courts that infects Petitioner's argument has no place in this Court's consideration. Petitioner's suggestion that the filing of class actions asserting

(Cont'd)

argues that this Court should interpose itself to keep the class from trial because Petitioner might lose.[12] Respondents are charged with "forum shopping," as if this Court could or should rewrite the laws that entitle plaintiffs to file cases where they live against defendants who conduct business there. What rule would Petitioner have this Court impose that could remove *Snider* from its current venue? Petitioner can hardly claim surprise, prejudice or inconvenience with respect to *Snider*'s filing in Williamson County, Illinois. Petitioner has chosen to subject itself to Illinois venue laws, which provide for venue in any county in which a defendant does business; or, in the case of insurers, where an insured resides. *See* 735 ILCS 5/2-101, 2-103(e). Petitioner has long been headquartered in Illinois and does substantial business throughout the State. By its own count, Petitioner insures one in three Illinois

(Cont'd)
state claims in certain State courts subverts due process is belied by the record and the facts of both *Masonite* and *Snider*. Nor is there basis for Petitioner's undifferentiated and offensive disparagement of State courts. As noted in Cabraser, "Life after *AmChem*: The Class Struggle Continues," 31 L.A. L. Rev. 373, 368-94 (1998) (from which Petitioner quotes a single sentence wildly out of context), State court experience with class actions predates the Federal Rules; moreover, "there is an entirely justified preference for State courts as class certification courts of first resort since these are courts of general, not limited, jurisdiction and must address the [state law] issues." *Id.* at 387. The certification of nationwide classes by State courts is hardly a novel or aberrant phenomenon, and this Court has upheld their propriety. *See, e.g., Shutts, supra*; *Sun Oil v. Wortman*, 486 U.S. 717 (1988). Illinois has a rich and well-developed body of class action precedent, and its class action rules are fully congruent with, and predate, those of the federal courts. *See* Forde, *Class Actions* (Ill. Inst. for CLE 1996).

12. This Court previously rejected Petitioner's fundamental argument that because it has chosen to break its contract and defraud many millions of individuals (rather than just a few people), it should be entitled to special procedural protections under the Due Process Clause. That a party's exposure to liability should be coextensive with the magnitude of its conduct constitutes the essence of Due Process, not its violation. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 34 (1987) (Stevens, J. concurring) ("The character of harm that may flow from this litigation is not different from that suffered by other defeated litigants . . . The price of even-handed administration of justice is especially high in some cases, but our duty to deal equally with the rich and the poor does not admit of a special exemption for multibillion-dollar corporations or transactions").

residents. Petitioner did not seek removal to federal court. Under current federal and state law, the Trial Court has, and has properly exercised, jurisdiction over Petitioner and the Respondent Class. Whatever the merits of Petitioner and Amici's policy arguments that this Court should somehow "federalize" all class action law, this case does not present an opportunity to consider the issue.

Noting the proposed amendments to Fed. R. Civ. P. 23 giving the federal courts of appeals ***discretion*** to hear appeals from the grantor denial of class certifications, Petitioner argues "[t]his wise change to the federal rules currently has no counterpart in most states, including Alabama, Illinois, and other magnets for class action litigation." Petition at 30. This argument is disingenuous. Rather than utilizing the provisions of Ill. Sup. Ct. Rule 308(a), to request the ***discretionary*** interlocutory relief Petitioner claims it was denied, Petitioner *voluntarily chose to bypass the available normal procedure for appellate review* and seek mandamus directly from the Illinois Supreme Court under the more stringent standard applicable to that relief. Only after having been rejected on its first end run to the Illinois Supreme Court did Petitioner approach the Trial Court and request leave under Ill. Sup. Ct. Rule 308 to review that Court's notice order and the December 5, 1997 certification order — in short, current Illinois state and federal practice are consistent and Petitioner had access to the relief it claims it was denied.

Petitioner in essence seeks an order from this Court legislating the mandatory review of class certification orders, something proposed Fed. R. Civ. P. 23(f) does not itself contemplate.[13] The imposition of such a requirement of interlocutory relief, or a ruling from this Court holding that it is an abuse of discretion not to

13. Proposed Rule 23(f) was submitted to Congress by this Court on April 24, 1998. It will provide as follows:

> (f) APPEALS. A court of appeals may *in its discretion* permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. *An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.* [emphasis supplied]

entertain direct interlocutory appeal to the state's highest court rather than an intermediate appellate court, would be at odds with prior decisions of this Court, and significantly upset the carefully crafted balance between federal and state courts. In *Coopers & Lybrand*, 437 U.S. at 476, this Court unanimously rejected Petitioner's argument and held that "[t]he Courts of Appeals have correctly concluded that orders granting class certification are interlocutory," *id.*, and that allowing mandatory appeals "involve questions of policy for Congress." *Id.*

For these reasons (which apply with equal force to State Farm's petition), this Court rejected the essence of Petitioner's argument: "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason to consider it a 'final decision' within the meaning of § 1291." *Id* at 477. In so holding, this Court pointed to the availability of discretionary interlocutory review under 28 U.S.C. § 1292(b) — *which confers rights identical to those available under Ill. Sup. Ct. Rule 308(a)* — as the appropriate vehicle for review.

In *Johnson, supra*, this Court unanimously rejected the claim that a State court must allow mandatory interlocutory appeals of some federal issues, *id.*, 117 S. Ct. at 1805, and rejected the principle that a failure to entertain interlocutory appeals is 'outcome determinative,' noting that "the claim will be reviewable . . . after the trial court enters a final judgment, thus providing the petitioners with a further chance to urge their" claims. *Id.* at 1806.

Given that the Due Process Clause does not require Petitioner be afforded any appeal at all, *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 566 (1996), the extensive opportunities for interlocutory relief Illinois has afforded Petitioner are far more process than is due.

III. THE TRIAL COURT DID NOT MAKE A CHOICE OF LAW DECISION AND THE CLASS IS CERTIFIABLE UNDER ILLINOIS OR MULTIPLE STATES' LAWS.

Asserting arguments not raised before the Trial Court,[14] Petitioner wrongly attacks a choice-of-law decision which the Trial Court *has not yet made*, and that the Trial Court *expressly reserved for decision at a later time*.[15]

1. The Trial Court's discussion of choice-of-law issues was strictly and properly limited to the issue of whether *variations in law might preclude certification of a class*. In determining they would not the Trial Court discussed *Shutts*, *supra*, and Illinois precedent that had applied the Illinois Consumer Fraud Act to the claims of out-of-state plaintiffs under *Shutts*.

Rather than presenting the Trial Court with relevant differences in state law, requesting that subclasses be created, or requesting *any ruling* on the choice-of-law issue, Petitioner instead sought mandamus from the Illinois Supreme Court. The arguments Petitioners and amici make to this Court are properly to be made,

---

14. Before the Trial Court, State Farm relied exclusively on *Shutts, supra*, neither discussing *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), nor the Commerce Clause on which it now relies. Likewise, Petitioner failed to raise the McCarran-Ferguson Act, 15 U.S.C. § 1011 and much of the extensive material contained in the Petition at 12, n.7. Arguments not raised before a trial court, including constitutional challenges, are waived under Illinois law. *Texaco-Cities Service Pipeline Co. v. McCaw*, 695 N.E. 2d 481 (Ill. 1998); *The People ex rel. Hartigan v. The Illinois Commerce Comm'n*, 117 Ill. 2d 120, 131, 510 N.E. 2d 865, 869 (1987). Claims not properly raised in State court are not reviewable in this Court. *Illinois v. Gates*, 462 U.S. 213, 217-19 (1983). *Stembridge v. Georgia*, 343 U.S. 541, 547-8 (1952).

15. Petitioner does not contend that the Trial Court erred in finding that any eventual choice-of-law decision would not bar certification. Nothing in this Court's decisions, requires that the choice-of-law issue be conclusively determined at the time certification is granted. *Shutts*, 472 U.S. at 801. Instead, the Trial Court, looking at the facts of this case, determined only that choice-of-law issues would be manageable because Illinois would *likely* apply to all claims, and, if not, because a limited number of sub-classes could be created to address any variations of law.

if at all, to the Trial Court. Any class member or other person whose legal interests are affected by the choice of law determination may address this matter in the Trial Court at any time. Because there has been no final decision on this issue, this Court should reject Petitioner's request to interfere with the trial court's decision-making process and prematurely decide a constitutional issue. *See supra*, at 13-14.

2. Even if the Trial Court *had* decided to apply Illinois law to all class members' claims, its decision would have been fully consistent with *Shutts*. "There could be no injury in applying [forum state] law if it is not in conflict with that of any other jurisdiction connected to this suit." *Shutts*, at 816 (bracketed text added).

The Petition contains an extensive footnote which attempts to show — for the first time on appeal — the existence of true conflict of law.[16] Each of these purported conflicts is false, and does *not* trigger the need to make an interest determination under *Shutts*. The Massachusetts regulation cited by Petitioner requires the use of non-OEM parts only when such parts are "of like kind and quality," 211 CMR 1303-04(1). This presents *no* conflict, and

---

16. Petitioner's argument, in effect, is that if such a conflict exists then application of Illinois law will undercut the principles of *BMW of North America, Inc. v. Gore*, 517 U.S. 557 (1995). This argument is based upon a false premise that the underlying lawsuit will *foreclose* use of non-OEM crash parts. Plaintiffs do not challenge the use of non-OEM crash parts other than to the extent that Petitioner has contracted to restore policyholders' vehicles to their "pre-loss condition" or to use parts of "like kind and quality." Nothing in the underlying lawsuit seeks to prohibit the use of non-OEM crash parts other than under Petitioner's current contractual language.

Gore is also distinguishable. *Gore* was not a multistate class action, as is this case, but an individual action brought by a single plaintiff. Rather than involving choice-of-law determinations, *Gore* concerned the permissible scope of punitive damages in a non-class case. Finally, unlike this case, *Gore* involved an arguable attempt by a State court to control defendant's conduct in other states whose residents or claims were not before the court or connected in any way to Alabama. Here, *all* plaintiffs' claims are fundamentally connected to Illinois because the misconduct emanates and is ultimately controlled from Illinois and *all* transactions between Petitioner and the class have an Illinois nexus.

instead raises the common fact issue which will be adjudicated on the merits by the Trial Court. Similarly, Hawaii's provision cited by Petitioner requires the availability of "a *like kind and quality part* of an equal or better quality than the original equipment manufacturer part only *if such part is available*." HRS § 431:1OC-313.6(a) (emphasis added). Again, this Hawaii regulation raises but does *not* answer exactly the same issues raised in this case: are non-OEM external body "crash parts" of like kind and quality to OEM parts? Neither State requires or even recommends the use of imitation parts if they are not equivalent to OEM parts.

Petitioner's reliance upon disclosure statutes to show a "true conflict" exists is similarly unavailing. The weakness of Petitioner's argument is demonstrated by its citation to Florida regulations in claiming that "some States permit the use of non-OEM parts even without disclosure." Petition at 12, n.7. 806 Fla. Admin. Cod. Ann. 4-166-027(10), reads in its *entirety*:

> No insurer shall require the use of replacement parts in the repair of an automobile unless the parts are at least equal in kind and quality to the original parts in terms of fit, quality, and performance.

This regulation raises no "true conflict," and in fact supports the Trial Court's determination that possible conflicts of law would not prevent certification of the class.

More generally, as the brief discussion of these regulations shows, a determination if true conflicts exist is an inherently fact-based inquiry which is not appropriate for resolution by this Court on the basis of a few misleading citations by Petitioner. *Shutts*, 472 U.S. at 823.

Finally, assuming, *arguendo*, that true conflict exists, Illinois law may nevertheless be constitutionally applied to all Plaintiff's claims. If a true conflict exists, the state's substantive law can be constitutionally applied if "that State [has] a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is either arbitrary or fundamentally unfair." *Shutts* at 818 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981)). Not only is Petitioner headquartered in Illinois,

but the relevant contract language, fraudulent practices, practice of using non-OEM parts, and control over the policy of non-OEM parts use originated in, was directed from, and was implemented through State Farm executives located in, and operating from, the State of Illinois. This conduct "implicates the legitimate interests of the State of Illinois in ensuring that persons and entities within its jurisdiction . . . [act] in accordance with its law." (Pet. App. at 11a.) It is also *not* unfair, arbitrary, or beyond "the expectation of the parties," *Shutts*, 472 at 822, that Illinois law might be applied to all claims against Petitioner; State Farm should reasonably expect that Illinois law may control a case involving an Illinois insurance company and conduct which emanated from Illinois.

IV. THE TRIAL COURT'S DECISION TO CERTIFY THE CLASS RAISES NO FEDERAL QUESTION.

Based upon review of an extensive factual record, and its application of the correct law to those facts the Trial Court found that the litigation should be managed as a class action, and should ultimately be tried on a class basis. Petitioner now seeks to relitigate this non-final decision before this Court. *See* 735 ILCS 5/2-802. Because the discretionary certification decision of the Trial Court raises no substantial federal question, this Court should deny review. *See Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367, 367 (1970); *Wolf v. Weinstein*, 372 U.S. 633, 636 (1963).

1. The decision to certify, or not to certify, a case is discretionary and inherently fact-specific. *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1061 (8th Cir. 1975). Petitioner improperly requests *de novo* by this Court to the Trial Court's factual findings regarding certification. Such relief is not available. *Sperry Rand Corp. v. Larson*, 554 F.2d 868, 873 (8th Cir. 1977).[17]

17. This Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions." Address of Chief Justice Vinson before the American Bar Association, September 7, 1949, 69 S. Ct. v, vi. *See also United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a *certiorari* to review evidence and discuss specific facts.").

2. Petitioner's principal challenge to the State court's trial certification decision rests on State Farm's assumption that it will prevail on the merits, *i.e.*, that Plaintiffs will not be able to prove at trial that non-OEM crash parts are categorically inferior and sub-standard, and, that the case is therefore not manageable. The Trial Court rejected this argument based upon the factual submissions of both parties. (Pet. App. at 10a, 15a.)

In arguing the Trial Court erred in deciding this case could be tried by Plaintiffs on the basis of classwide proof, Petitioner fails to inform this Court that at least two courts, including one in Illinois, have certified state-wide classes involving exactly the same issues which were certified in this case for trial against *this same Defendant*.

More generally, Petitioner's argument on manageability rests on irrelevant cases decided in unrelated factual situations. Here, the Trial Court was presented with sufficient classwide proof that State Farm's form contracts and actual practices were standard, and that Plaintiffs can rest their case on common evidence that the non-OEM crash parts at issue are inferior. This decision neither erred nor raises a substantial federal question suitable for review by this Court.

The appropriateness of certification in cases like this for trial through class-wide proof was most recently recognized in *Cope v. Metropolitan Life Insurance Co.*, 696 N.E. 2d 1001 (Ohio 1998) in which the Ohio Supreme Court reversed the trial and appellate courts' rulings denying class certification, rejecting the contention that "individualized proof" or "individualized scrutiny of each transaction" would be necessary to determine each claim. *Cope* restates the prevailing view of the federal and State courts in the consumer context:

> Courts generally find that the existence of common misrepresentations obviates the need to elicit individual testimony. . . . They recognize that when a common fraud is perpetrated on a class of persons, those persons should be able to pursue an avenue of

> proof that does not focus on questions affecting only individual members.

Id. at 1004 (citing federal cases). As *Cope* also noted:

> Courts also generally find that a wide variety of claims may be established by common proof in cases involving similar form documents or the use of standardized procedures and practices.

Id.; *see also AmChem*, 117 S. Ct. at 2250; *In re: Prudential Ins. Co. Am. Sales Practices Lit. Agent Actions*, 1998 U.S. App. LEXIS 17057 *92-93 (3d Cir. 1998); *cf. Bazemore v. Friday*, 478 U.S. 385, 398 (1988). Rejecting the argument Petitioner makes in this case, one court recently noted,

> considering the facts of the case presented, a claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position.

Lockwood Motors, Inc. v. General Motors Corp., 162 F.R.D. 569, 580 (D. Mn. 1995).

Class certification in this case will enhance due process by allowing individuals who could not otherwise challenge Petitioner's uniform practice of specifying inferior non-OEM parts in the repair of their vehicles to seek recompense. *See AmChem*, 117 S. Ct. at 2246 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997). ("The policy at the very core of the class action mechanism is to overcome the problem that when small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.").

Petitioner now argues that due process is abridged by a trial court's decision to try a case on a class basis. This argument attempts to prove too much. A class certification order properly prevents Defendant from usurping Plaintiffs' prerogative to choose the method of proof of their claims. Only if sufficient class-wide proof is presented at trial to show that State Farm's specification of the

non-OEM crash parts at issue cheats policyholders or constitutes a breach of its contract, will the Class prevail. Defendant is not prevented from showing its practices are proper or justified. The class certification decision in no way deprives Petitioner of its right to a defense; it merely frames the issues relevant to Plaintiffs' case in chief.

The cases cited by Petitioner, without regard for their holdings or context, entirely fail to support Petitioner's argument that the class action device, by allowing class-wide proof, violates due process. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) and *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971), stand for the principle that an individual has a right to *make its arguments to a court*; they do not require the court to allow an individual to continue to argue a discredited point once the court has ruled.

As with decisions to exclude evidence, see *United States v. Scheffer*, 118 S. Ct. 1261 (1998), or expert testimony, *see GE v. Joiner*, 118 S. Ct. 512 (1997), no due process principle allows Petitioner to require the opposing party to present evidence or proof the Trial Court found inadmissible and irrelevant. *See* Fed. R. Ev. 401, 402. In fact, the express power to do, what State Farm claims the certification order did as a matter of fact — exclude irrelevant issues as a "waste of time" — is expressly granted to trial courts by Fed. R. Ev. 403. Simply put, there is nothing in the process of allowing a Plaintiff Class to attempt to prove its claims by common, rather than individual proof, that violates any principle embedded in the historical meaning of the Due Process Clause. In any event, no evidence or defense has been excluded, since the trial has not yet taken place!

V. IN APPROVING THE CLASS NOTICE PROGRAM THE TRIAL COURT CORRECTLY APPLIED ILLINOIS PRECEDENT AND THE DUE PROCESS RULINGS OF THIS COURT TO ITS FACTUAL FINDINGS.

Petitioner's notice argument has two primary defects: (1) Petitioner incorrectly assumes — contrary to the trial court's findings — that mailed notice is practicable or effective under the circumstances of this case, where the only record of class member

addresses is inaccurate and out-of-date; and (2) Petitioner assumes that regardless of the ineffectiveness of mailed notice, mailed notice must always be given in lieu of a demonstrably more effective published notice campaign, as if the "best practicable notice" standard mandated a slavish commitment to *form* rather than *result*.[18]

To meet the "best practicable" notice standard, under the particular circumstances of the *Snider* action, Plaintiffs submitted a comprehensive fifty-six page notice plan supported by evidence as to its "reach"[19] and effectiveness. The Plan has been implemented. It consisted of three elements:

---

18. Because Petitioner must "have suffered an 'injury in fact' — an invasion of a legally protected interest which is (a) concrete and particularized. . . . and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.' " *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted) and no such injury exists in this case, Petitioner lacks standing to assert rights of class members to a particular *form* of notice. Petition's citation to *Shutts* in an effort to show standing fails to note that this Court allowed defendant to raise the claim that the *court did not have jurisdiction over* members of the *plaintiff class*, *Shutts*, 47 U.S. at 806, such that any judgment in defendant's favor would have been a nullity — a concrete injury. Because the right to opt out is personal to the individual and opt-outs do not have the right to pursue competing class actions, *Hanlon v. Chrysler Corp.*, 1998 U.S. App. LEXIS 11957 at 25 (9th Cir. 1998), the only harm that Petitioner *potentially* faces is the *risk* that, if Petitioner succeeds on the merits, an *individual* might argue that notice was inadequate and — assuming that she could convince a court that: (1) she had no actual notice; (2) if mailed notice had been sent, she would have received it; and (3) would then have exercised her opt-out rights — file an *individual* claim. As a practical matter, the doctrine of collateral estoppel would likely bar any such individual claims, *Hansberry v. Lee*, 311 U.S. 32 (1940), and given the small size of the individual claims at issue in this lawsuit, the threat of harm Petitioner claims is at best merely "hypothetical." *See AmChem*, 117 S. Ct. at 2246.

19. In marketing/communications parlance, "reach" is a term of art referring to the ability of a message to be actually read or heard by the intended recipient. By contrast, the fact that a mailed notice may (or may not) be placed in an addressee's mailbox does not demonstrate that it has actually "reached" (been opened or read by) that person. To the contrary, evidence developed by the U.S. Postal Service through their household diary study, presented by Plaintiffs, unrefuted by Defendant, and noted by the trial court, showed that 46.6% of official and governmental mailings are not read immediately, completely and/or are discarded unread.

First, the Plan included a nationwide publication plan which placed the notice in publications targeted to reach the highest number of class members. Notice was placed in major magazines, as well as *over* 850 newspapers nationwide. (Pet. App. at 23a.) The notice was prominently placed in the main news section in readable type with eye-catching headings. (Hilsee Aff. at 6.) *Second*, the plan generated news coverage of the lawsuit and the opt-out deadline. (Pet. App. at 23a.)[20] *Third*, the plan involved placing notice on the Internet at a dedicated website promoted via placement on all major Internet search engines and through Banner advertising. (*Id.*)

In support of this comprehensive multi-part notice plan Plaintiffs presented expert testimony and scientifically verifiable figures that the notice program would "reach" at least 76.4% of the class members. (*Id.* at 24a.) As implemented, the notice plan reached over 78% of class members. (Notice Impl. Aff. at ¶ 6.)

Petitioner proposed a notice plan, rejected by the Trial Court, that relied on mailed notice to an inaccurate list of names. Petitioner suggested that notice be mailed to one of two alternate lists: (1) an admittedly grossly *under-inclusive* list that contained 1.8 million names and addresses, some substantial portion of whose addresses were outdated and incorrect, (Pet. Aff. at 26a); and (2) an admittedly grossly over-inclusive list of nearly 19.1 million State Farm policy holders, only a small portion of whom were class members, and many of whose addresses were also inaccurate. (*Id.*)

In deciding what notice to provide, the Trial Court indicated its assessment of the credibility of Respondent's submissions, noting that their notice expert's testimony was credible, (*id.* at 24a), and then that the data presented to the court to show that the notice plan would have a 'net reach' of at *least* 76.4% of the potential class members were "supportable and verifiable." (*Id.*) The Trial Court determined that Petitioner's claims (now renewed before this Court) were factually not credible. (*Id.* at 25a.)

---

20. Those efforts were fully implemented, resulting in at least 6,197 articles and broadcast appearing, thereby reaching a total audience of over 36,600,000 people. (Notice Impl. Aff. at ¶ 6.)

The Trial Court found that "*State Farm has not presented, and is not able to present, a reasonably accurate list of potential class members from its records,*" *(id. at 27a)*, or "any scientifically verifiable facts which indicate that the reach of their proposed mailing (if it could be done accurately) and limited publication notice plan equals or surpasses the reach of Plaintiffs' Notice Plan." *(Id.* at 27a.) Petitioner asks this Court to disregard Petitioners' own submissions below, and the Trial Court's carefully factual findings, to independently declare that the Trial Court's determinations of credibility and its weighing of the evidence was erroneous, and to simply substitute the findings Petitioner sought, but could not support, below, for those the Trial Court made.[21]

In requesting review of these factual determinations, Petitioner raises no substantial Federal Issue nor does it cite to *any* evidence the Trial Court ignored, or *any* flaws in its reasoning. Rather, Petitioner claims that the Trial Court's "principal rationale was its conclusion that mailed notice would be no more effective than publication notice" in all cases. Petition at 22. The court below found that the specific notice plan submitted by respondents was more effective than the mailed notice plan *submitted by Petitioner*, which called for mailing to an inaccurate and incomplete list of individuals, and thus was not reasonably calculated to reach the members of the class under the particular circumstances of this case.

In deciding the notice issue, the Trial Court expressly considered *Mullane v. Central Hanover Bank & Trust Co.*, 339

---

21. This Court's usual practice is to "defer to state-court factual findings, even when those findings relate to a constitutional issue." *Hernandez v. New York*, 500 U.S. 352, 366 (1991). The presumption of correctness of a trial court's factual findings is especially strong when, as in this case, those findings "are based on determinations regarding the credibility of witnesses." *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985). When this Court reviews judgments which are truly final, as this judgment is not, it has the benefit afforded by a review of the record by both the trial court and one or several appellate courts and need not consider the factual issues "absent the most exceptional circumstances." *Branti v. Finkel*, 445 U.S. 507, 512 (1981); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

U.S. 306 (1950), and *Shutts*, *supra*, and found that due process required the flexible notice requirement, also embodied in Illinois decisions, which required the best notice practicable given the unique circumstances of this case. (Pet. App. at 29a.)

Petitioner cites to *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and other cases (Petition at 22-23) for the erroneous proposition that notice by mail is always required, regardless of the facts of a case. However, the cited quotes from *Eisen* (and the other cases cited by Petitioner) stand for a different proposition: that "notice by publication has long been recognized as a poor substitute for *actual* notice." *Id.* 417 U.S. at 175 (emphasis added).[22] It is, of course, self-evident that there may be a considerable difference between *actual notice* and even the best practicable notice available in a case, whether that notice is mailed or published. It is the latter, not the former that is required. *Shutts*, 472 U.S. at 812.

In each case Petitioner cites to support its *per se* preference for mailed notice, there were *two* major differences from the comprehensive notice published in this case. First, in each, "tombstone" notice was buried in the back of a newspaper — in effect a notice designed *not* to give actual notice, to "reach" the class, or to be read. *Mullane*, 339 U.S. at 315. *See Walker v. City of Hutchinson*, 352 U.S. 112, 113(1956); *City of New York v. New York, New Haven & Hartford RR Co.*, 344 U.S. 293, 294 (1953); *Mullane*, 339 U.S. at 309. Here, by contrast, the notice

22. The Trial Court committed no error in relying upon decisions of the Illinois Supreme Court in *Frank v. Teachers Ins. Annuity Assoc. of America*, 71 Ill. 2d 583, 594 (1978) and other courts that *Eisen* was neither constitutionally based, nor required notice via mail to the inaccurate and incomplete list petitioner presented to the Trial Court. Petitioner's contention that *Eisen* is constitutionally binding is belied by the language of that case and by how it was cited by this Court in *Shutts*. *Shutts* based its requirement as to what notice was constitutionally required under the Due Process Clause in multi-state class actions squarely upon this Court's holding in *Mullane*. *See Shutts*, 472 U.S. at 812 (quoting *Mullane*). In his opinion for the Court, then-Justice Rehnquist merely cited to *Eisen* as a "cf' citation, suggesting it was not direct support as to what notice was constitutionally required. The *Eisen* opinion itself repeatedly makes crystal clear that its decision rested upon the requirements of Rule 23, not Due Process. *See, e.g.*, *Eisen*, 417 U.S. at 172, n.10, 172-73, 177.

was placed prominently to catch class members' attention and was distributed nationwide with multiple opportunities for class members to read it. Second, unlike here, the *actual* address of the person sought to be reached in each case cited by Petitioner was *known*. *See Walker*, 352 U.S. at 116; *City of New York*, 344 U.S. at 296; *Mullane*, 339 U.S. at 318. Petitioner's cases are therefore inapposite.

It is not the selection of a particular *medium* of notice (*e.g.*, mail) that is essential, but the selection of the *most effective* medium of notice that is practicable in a particular case. *Shutts*, 472 U.S. at 812 (" 'The notice must be the best practicable 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' *Mullane*, 339 U.S. at 314-315.")

Rejecting the *per se* rule petitioner advocates one court noted:

> Here — for all the reasons previously noted — all we know is that among the 70,000 addresses there will be a substantial number of class members. As for the rest — perhaps as many as half— the mailing is an idle act. . . . *Neither due process nor the integrity of the class action process demands such useless and wasteful procedures.*

Cartt v. Superior Court, 124 Cal. Rptr. 376, 381 (Cal. App. 1975) (emphasis added); *In re Domestic Air Antitrust Litigation*, 141 F.R.D. 534 (N.D. Ga. 1992).

At bottom, the rule proposed by Petitioner fails to comport with the essential (and common sense) holding of *Mullane* that "the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* 339 U.S. at 315. Basing notice on a mailing list containing significant inaccuracies would never be the means employed by one reasonably desirous of actually reaching a group of individuals, especially if the list only contained a small portion of the individuals sought to be reached, as did the list rejected by the Trial Court. Indeed, the mailing list Petitioner presented to the Trial Court is the functional and due process equivalent of the published notice

rejected by this Court in *Mullane*. Based upon the Trial Court's factual determinations, this Court's precedent, and common sense, this Court must decline Petitioner's invitation to relitigate these pretrial procedural determinations by the Trial Court.

CONCLUSION

The Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

ELIZABETH J. CABRASER
Counsel of Record
MORRIS A. RATNER
SCOTT P. NEALEY
LIEFF, CABRASER, HEIMANN
& BERNSTEIN, LLP
Attorneys for Respondents
Tammy Snider, Michael Avery
and Plaintiff Class
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
(415) 956-1000

APPENDIX

APPENDIX A — ORDER OF THE SUPREME COURT OF ILLINOIS DATED JANUARY 21, 1998

Supreme Court of Illinois

January 21, 1998

No. 84639
No. 84640

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Petitioner,

SUZANNE M. KRUSINSKI, ET AL.,

Respondents.

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

This cause coming to be heard on the motions of the movant, State Farm Mutual Automobile Insurance Company, responses having been filed by respondents, replies having been filed by the movant, and the Court being fully advised in the premises;

There being sufficient votes to allow or deny any of the motions, the Court takes no action on the motions.

Chief Justice Freeman, Justice Miller, and Justice McMorrow would have allowed the motion to transfer and consolidate, and the motion to stay.

Justice Bilandic took no part in these cases.

APPENDIX B — TRANSCRIPT OF PROCEEDINGS DATED FEBRUARY 26, 1998

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT WILLIAMSON COUNTY, ILLINOIS

No. 97-L-114

JEANNE M. TETER TAMMY SNIDER, and MICHAEL E. EVERY, On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

REPORT OF PROCEEDINGS

Report of proceedings of the motion hearing before the Honorable John Speroni on February 26, 1998.

APPEARANCES:

FOR THE PLAINTIFFS:
G. PATRICK MURPHY

FOR THE DEFENDANTS:
KENT BRANDON

Jennifer J. Young, CSR
Williamson County Courthouse
Marion, Illinois 62959
CSR# 084-003584

Appendix B

THE COURT: The Court is going to call to order Case number 97-L-114, Snider et al., versus State Farm. Present in open court is Attorney Patrick Murphy representing the Plaintiffs and Attorney Kent Brandon on behalf of the Defendants, State Farm.

The court would note for the record that yesterday — yesterday being February 25th C the Court entered an order setting the exclusion request deadline, approving the form of notice of class certification, and directing the implementation of the notice plan.

After the Court entered the order and the order was filed with the clerk, State Farm filed several motions, two of which specifically being the motion for reimbursement of discovery costs and the motion to redact portions of its data bases or, in the alternative, for in camera review of opinion work product, don't have anything to do with the matters we are here on today, nor does a motion to continue trial dates, which was filed.

Another motion, however, is entitled motion for leave to respond to Plaintiffs' new notice submissions and the — excuse me — stay the effects of any order providing for publication on the class in the pending presentation of Rule 308 motion.

This morning when I arrived at the courthouse, my secretaries advised me that there had been a request for a hearing this morning. And thereafter, State Farm filed a motion — when I say "this morning", it's February 26, 1998 — State Farm had filed a motion entitled State Farm's motion to certify for interlocutory appeal requests regarding class certification and notice, and, Two, to stay proceedings. And that is the motion the Court believes the parties wish to proceed on or have asked the Court to hear today.

Appendix B

Before we proceed to arguments, Mr. Brandon, as I would read State Farm's motion for leave to respond to Plaintiffs' new notice submissions and to stay the effects of any order providing for publication on the class in the pending presentation of the Rule 308 motion, I would see that motion as moot at this point since the Court had already ruled before the motion was filed, and since apparently we are here already on a 308 motion.

MR. BRANDON: I believe that's correct, Your Honor.

THE COURT: Well, the Court then from the bench is simply going to rule on that motion and deny it as moot.

Are there any other housekeeping matters we need to take up before we hear arguments on the motion filed today to certify for interlocutory appeal certain questions? Mr. Murphy?

MR. MURPHY: No.

THE COURT: Mr. Brandon?

MR. BRANDON: No, Your Honor.

THE COURT: All right. Mr. Brandon, I'll hear State Farm's arguments on the motion to certify interlocutory appeal certain questions.

MR. BRANDON: May it please the Court, I believe the Court has accurately stated the procedural history at this point. I would say this, Your Honor, however. There was some indication in the prior order of the Court that the Court was planning to — that the parties should assume the Court was going to rule by February 27th. And I think based on that,

State Farm, without knowing that the Court had entered this order on the 25th, had prepared and was going to hand deliver to the Court the motion which the Court has now indicated is moot. And State Farm had prepared that motion and was going to file it prior to the time that the Court had ruled. And when I arrived at the courthouse, of course, I received — I filed my motion then proceeded to the judges' secretaries desk where I obtained the order of the Court.

So procedurally, the motion did become moot, but State Farm was not aware of that.

THE COURT: The reason I did the 27th, just for clarity, I wanted to give myself as much as time as possible. My schedule today and tomorrow was pretty open, but I managed to work on it earlier and got it done.

MR. BRANDON: I understand, Your Honor. I'm just saying that the time sequence was very close together.

THE COURT: It was. It was.

MR. BRANDON: In regard to the motion that State Farm is filing now, I think it has real similarities to the one that was filed yesterday. And basically I think the motion is self-explanatory. State Farm seeks from the Court the opportunity to file — to pursue a Rule 308 procedure and is requesting this Court to certify for immediate interlocutory appeal the notice question. And we want to do that.

We also give the Court an opportunity to consider this motion. And the problem that we have in the order the Court entered yesterday by the Court, in Paragraph 31, that order

specifically finds that the notice campaign is so to commence upon the entry of this order.

Now, I take that to mean it would commence as soon as the order was entered on February 25th. That being the case, State Farm has no opportunity whatsoever to come into court and request of the Court consideration under Rule 308 and to certify this. And I think that by denying State Farm that opportunity, it creates a prejudice on the part of the company.

I think in this particular case that once this notice starts and the campaign begins, then it's going to be very difficult to stop that. It's kind of like trying to unring the bell, so to speak. And I think at least State Farm should have the opportunity to present to the Court its 308 request to have this matter certified interlocutory appeal. And asking for a brief amount of time to do that certainly would not be prejudicial to the Plaintiffs.

This case is not set for trial for nearly a year. I think it's set on February 1st of 1999. The time frame that's built into the Court's order allows an opt-out date of June 5th of 1998, which is more than 90 days away. And if for whatever reason the Court should have made an incorrect ruling and the Appellate Court should see fit to alter it in any way or to reverse the Court's ruling, then the damage of State Farm has been done.

If the Appellate Court, after considering the 308, decides the Court is correct, the matters can proceed accordingly. But by not giving State Farm the opportunity to present the 308 and having things go forward without any possibility of the 308 request puts State Farm in a very difficult position.

And I think that this particular case certainly does meet the requirements of Supreme Court Rule 308. The issue we are

talking about here that was certification of the class involves a question of law to which there is a substantial basis for a difference of opinion. And one of the things we presented to the Court is a ruling by a judge in Cook County, a ruling in a case involving Allstate where it's quite similar to this case, where he found that he wouldn't certify the class.

And it's just an example that there might be a difference of opinion here. And certainly the way this case has progressed I think has demonstrated to the Court that there is a substantial difference of opinion. And State Farm on other occasions presented to the Court a ruling in the *Deans* and *Sessions* cases regarding this same matter.

THE COURT: MR. Brandon, excuse me for interrupting. But just as a point of clarification, are you asking for additional time to present the 308 motion? Because what was filed today, as I read it, is State Farm's motion to certify the interlocutory appeal and also a memorandum in support of State Farm's motion to certify for interlocutory appeal the class certification and notice issues. It's a 13-page brief.

MR. BRANDON: No. I'm sorry. I don't mean to imply we want more time to present the motion. That was the yesterday motion.

THE COURT: I just wanted to make clear —

MR. BRANDON: We are just trying to establish — what I am doing, hopefully now, is establishing to the Court the reason why this is an appropriate 308 motion based on the statutes.

THE COURT: All right. Because that's what I understood we were —

MR. BRANDON: Exactly. Exactly.

THE COURT: And that's why I gave you guys, in essence, an emergency setting this morning.

MR. BRANDON: That's correct, Your Honor. But as I indicated, we have attached for the Court's benefit a ruling from the Cook County's *Allstate* case where a judge there came to a different conclusion than the Court did in this case.

And we have also presented testimony and evidence regarding the finding, I believe, in the *Deans* case in Tennessee which also is not certified.

In this particular case, an immediate appeal from this order would materially advance the ultimate termination of litigation. If this — if the Appellate Court should decide that this class was not properly certified, that would have the effect of basically ending this litigation. So the requirements of 308, I believe, are present here.

You have got a question of law where there could be a substantial difference of opinion. And we have demonstrated that to the Court. And you have got a situation where if the Appellate Court were to in any way alter your ruling or to reverse it, it would materially advance the ultimate termination of litigation. I think that the essence of our arguments are contained in the motion and in the memorandum which we have filed.

But basically State Farm believes that by not giving it the opportunity to take the interlocutory appeal, that its rights are being very prejudiced in this case. And by the same token, I

don't think the Plaintiffs' rights would be prejudiced, because we would get a result which we would all then know whether or not this case should go forward.

So for this reason, State Farm is requesting that the Court immediately certify this case for interlocutory appeal on the questions presented here pursuant to Supreme Court Rule 308.

THE COURT: MR. Murphy?

MR. MURPHY: Your Honor, yesterday at, I believe it was, five o'clock Pacific time, we, in fact, implemented the notice program. We are now contractually committed, and money is spent, and it is under way. That's just a fact.

Now, as to the 308 matter, as Your Honor knows, that's well within the discretion of the trial court. We are very comfortable with the fact that the Court's orders are correct on both issues well within the discretion of the trial court.

There really is no substantial dispute here as to what the law is. Elizabeth Cabraser did the research herself on the issue of what notice is required under these circumstances. And it is reflected in our submissions. And we think so much of her research and your order that we have irrevocably committed ourselves to that particular course of action.

There is no reason to give State Farm a special appeal in this case. They will from time to time apply to you or any other judge they can find anywhere for some kind of special relief as they have shown in the past. That's just going to happen. As we speak, we have people waiting at the Supreme Court because we expect that they will probably make an application to the

Supreme Court. And we have people in Cook County waiting for them. But that's just going to happen.

But the bottom line here is there just really isn't any issue that deserves this special treatment. We very carefully researched the issue. I know Your Honor read it, because I read your order. And there is no reason to give them this special relief. And the only thing I want to make very clear for the record — and Mr. Brandon wasn't here, so he didn't get the full flavor of what's happened. And I'm sure he is thankful he wasn't — in their memorandum they keep speaking of our new notice submissions. We have not made any new submissions. Your Honor ordered us to file on the 20th a proposed order containing conclusions of law and finding of facts. And that's just exactly what we did. And we gave them a copy of it.

So any suggestions in their memos and their arguments that we have snuck something in on them or done something, which is the flavor of what they are saying, is just wrong. We have not done any of that. We did exactly what we were ordered to do.

So I am not going to take any more of your time. The motion for 308 certification should be denied. There is nothing special here that deserves this treatment. And we are irrevocably committed as of yesterday to the notice plan. It's under way right now.

THE COURT: Mr. Brandon, any follow-up?

MR. BRANDON: I do not, Your Honor.

THE COURT: The Court is going to take a recess. I have started reading the memorandum in support of State Farm's motion

to certify for interlocutory appeal questions regarding class certification and notice and the — and to stay proceedings. I want to take the time to read that carefully and look at any law that I need to look at. And I'll come back as soon as I can and rule on the record on State Farm's motion to certify the questions for interlocutory appeal. Where will you gentlemen be so that —

MR. MURPHY: Could I address the Court on that, Your Honor?

THE COURT: Certainly.

MR. MURPHY: I know Mr. Brondon has to fly. If he needs to run. If he needs to run. If he would authroize me, I would advise him of the — I mean, I would wait and then advise your office exactly what the Court did today.

THE COURT: Mr. Brandon, what time does your plane leave?

MR. BRANDON: I'm not on an airplane. I am on a drive to St. Louis.

THE COURT: And your deposition is at two o'clock?

MR. BRANDON: Yes.

THE COURT: So as long as you left by 11:30?

MR. BRANDON: I think that would be fine.

THE COURT: It's ten minutes until 10:00. And I think I could get through things in 30 or 45 minutes, an hour or so.

MR. BRANDON: I don't want to rush the Court.

THE COURT: I am not. I have read Rule 308 before. So I'll see what cases you have. And believe me, I'll take whatever time I need. If it runs into more time, it just will. We will be in recess. I'll be back in, and we will have our ruling.

MR. BRANDON: Thank you, Your Honor.

(At which point in the proceedings a break was taken.)

THE COURT: Back on the record in 97-L-114, Snider, et al., versus State Farm. The Court heard arguments on State Farm's motion to certify for interlocutory appeal questions regarding class certification and notice, and, Two, to stay proceedings earlier today.

The Court has now read the motion and read State Farm's memorandum in support of State Farm's motion to certify for interlocutory appeal questions regarding class certification and notice, and, Two, to stay proceedings. The Court would note for the record that Attorney Brandon and Attorney Murphy are present in Court.

The Court, having read the motion and memorandum, having done its own research both yesterday and today, and considering the record in this case, is ready to rule on the motion.

The statute involved in an interlocutory appeal is Supreme Court Rule 308. 308(A) provides when the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal

from the order may materially advance the ultimate termination of litigation, the Court is to so state in writing and identify the question of law involved. And that triggers the procedure for the Appellate Court to decide whether or not it wished to hear the interlocutory appeal.

Both of the matters raised by State Farm, the issue of class certification and the notice and notice plan are, in the Court's mind, interlocutory orders not otherwise appealable. So Rule 308 applies.

The Court would note that its class certification order was initially entered in this case on December 5th, 1997. State Farm in its memorandum filed today states and cites cases that the issue of class certification is the most significant decision involved in a class action lawsuit.

In the almost three months since this class was certified, there has not been any request for a Rule 308 appeal by State Farm or really any inkling given to the Court that any such request would be made. We are now eleven months away from the scheduled trial date in this case, and the Court, from what it has just seen concerning filings in the record of deposition notices and the discovery matters the Court has been called to rule upon already finds that significant resources have already been expended. And Attorney Murphy earlier today in open Court advised the Court that the notice plan which was ordered by the Court was contractually bound, if I remember the time correctly, at five o'clock Pacific Standard Time yesterday.

Of course, all the issues — all — both of the issues that State Farm requests for interlocutory appeal can, of course, be decided by direct appeal after trial. These issues of interlocutory

appeal can really come up in every case. In fact, every time a Defendant files a motion to dismiss, the issue becomes or could become whether or not an interlocutory appeal is appropriate.

The Court believes the case indicates it's something that should be sparingly used, but should be used in an appropriate case. So the Court, having read State Farm's motion seeking an interlocutory appeal and the memorandum, having done its own research and considered the entire record and proceedings in this case does not find that there is a question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation. And State Farm's motion is denied in all respects.

Anything further from the Plaintiffs or the Defendants?

MR. MURPHY: No.

MR. BRANDON: No, Your Honor. Thank you.

* * * END OF PROCEEDINGS * * *

APPENDIX C — RECORD SHEET

(Omitted here but printed separately as Lodging Appendix)

APPENDIX D — COURT-ORDERED CLASS ACTION NOTICE

If you have had vehicle repairs under your State Farm auto insurance policy, this notice may affect your rights.

Please read this Court-ordered Class Action Notice carefully.

In the Circuit Court for the First Judicial Circuit, Williamson County, Illinois, a lawsuit is now pending titled: *Tammy Snider and Michael Avery, on behalf of themselves and all other similarly situated, Plaintiffs, vs. State Farm Mutual Automobile Insurance Company, Defendant, No. 97-L-114.* This Notice is directed to all members of the Plaintiff Class, defined as: **All persons in the United States, except those residing in Arkansas and Tennessee, who (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had non-factory-authorized and/or non-OEM (Original Equipment Manufacturer) "crash parts"* installed on their vehicles or else received monetary compensation determined in relation to the cost of such parts.**

---

*"Crash parts" are vehicle components typically repaired or replaced as a result of crash damage rather than as a result of normal vehicle usage. The non-factory-authorized and/or non-OEM crash parts involved in this Plaintiff Class are of the following types: 1) fenders, 2) hoods, 3) doors, 4) deck lids, 5) luggage lid panels, 6) quarter panels, 7) rear outer panels, 8) front end panels, 9) header panels, 10) filler panels, 11) door shells, 12) pickup truck beds, box sides, and tail gates, 13) radiator/grill support panels, 14) grilles, 15) head lamp mounting panels/brackets/housings/lenses/doors, 16) tail lamp mounting panels/brackets/housings/lenses, 17) outer body mouldings, 18) door body side moulding, 19) front wheel opening mouldings, 20) side mouldings, 21) front and rear fascias, 22) outer panel mounting brackets, supports and surrounds, 23) bumpers (excluding chrome bumpers), 24) bumper covers/face bars, and 25) bumper brackets/supports.

Appendix D

Excluded from the Class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates. In addition, the following persons are excluded from the Class: (1) persons who resided or garaged their vehicles in Illinois and whose Illinois insurance policies were issued/ executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/ executed prior to September 26, 1996.

Notice of this lawsuit is given pursuant to Illinois statutes, and by order of the Court, to inform you of the Court's decision to certify a Plaintiff Class, the nature of Plaintiffs' claims, and your right to participate in or exclude yourself from the Class.

Individual and representative Plaintiffs Tammy Snider and Michael Avery have been appointed by the Court to function as representatives of the Plaintiff class. Plaintiffs' claims concern the contractual language contained in standard form State Farm automobile insurance policies issued nationwide, which, either obligates State Farm to restore a policyholder's vehicle to "its pre-loss condition" after an accident, or to "pay to repair or replace the property or part with like kind and quality." While State Farm has designed form policies specific to each state, the contractual obligations at issue in this case are stated in substantially identical form in State Farm policies issued nationwide.

Under this contractual language, State Farm uniformly specifies the use of certain non-original equipment manufacture ("non-OEM") replacement parts (referred to as "quality replacement parts" by State Farm and "imitation parts" by Plaintiffs) when these parts are available and priced lower than original equipment manufacturer's (OEM) parts. Plaintiffs

contend that non-OEM crash parts are neither of "like kind and quality," nor are they sufficient to restore a policyholder's vehicle to its "pre-loss condition." For this reason, Plaintiffs contend that State Farm has breached its contract with its policyholders. Plaintiffs also contend that State Farm's use of non-OEM crash parts and the term "quality replacement parts" are violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.*); Plaintiffs request compensatory damages and an injunction against State Farm.

State Farm denies any wrongdoing and contends that non-OEM parts are of "like kind and quality" to OEM crash parts, and that they fully restore a policyholder's vehicle to its "pre-loss condition." State Farm also contends that its policyholders are informed whenever non-OEM crash parts are used, and that its use of the term "quality replacement parts" is not misleading.

The Court has certified for litigation and trial the Plaintiff Class of State Farm policy holders described above. The Court's class certification order does not decide the merits of Plaintiffs' claims or State Farm's defenses. Plaintiffs will be required to prove the Class claims at trial set to commence on February 2, 1999.

Class Counsel have been appointed by the Court to represent the interests of the Class. Class Counsel include G. Patrick Murphy, Barrett Law Offices, the Rose Law Firm, Much Shelist Freed Denenberg Ament Bell & Rubenstein, P.C., and Lieff, Cabraser, Heimann & Bernstein, LLP. You will not be charged for Class Counsel's services. Instead, if they obtain a recovery for the Class, Class Counsel may apply to the Court for payment of their reasonable attorneys' fees and costs by State Farm or out of any funds recovered before distribution of

the net proceeds to the Class. You have the right to hire your own attorney. If you hire your own attorney, you will be responsible for paying that attorney's fee. You also have the right to seek to intervene or appear in the action with the Court's permission.

If you wish to remain a member of the Class, YOU NEED NOT DO ANYTHING AT THIS TIME. As Class members, you will be bound by all orders and judgments of the Court, and your claims will be terminated by the judgment in this case.

You may exclude yourself from the Class by writing to the address below, and expressly stating in a letter postmarked by June 5, 1998, that you wish to be excluded from the Class. If you exclude yourself from the Class, you cannot participate in any recovery for the Class, and you will not be bound by any Court orders or judgments. If you wish to remain a Class member, DO NOT send an exclusion letter.

If you have questions regarding this litigation, you may write to: Snider, et al. v. State Farm, et al., Plaintiffs' Class Counsel, P.O. Box 1500, Marion, Illinois 62959. You may also call 1-888-299-9777, or see the website at www.sfparts.com.

PLEASE DO NOT CONTACT THE COURT.

Dated: February 25, 1998. Honorable John Speroni
Associate Circuit Court Judge.

www.sfparts.com 1-888-299-9777